

Protection of Foreigners' Rights in Mexico

Introduction

This Article is in four parts. Part I discusses the status of foreigners in terms of constitutional and international legal principles, Mexican naturalization and immigration legislation and specific constitutional provisions; Part II deals with the protection of property rights and in particular the restrictions (historical and legislative) on foreign ownership and business activities in Mexico, repatriation and expropriation. Part III concerns the protection of personal liberties, particularly the rights of foreigners accused of crime, access to the courts and judicial review of executive action and diplomatic assistance. The last part treats the differences between the law as written and practiced.

International legal practice inevitably involves the representation of foreigners. For the American attorney, it is either foreigners in the United States or Americans abroad who will be represented. While no one on earth will argue against the principle of equality before the law, the fact is that foreigners are nowhere treated the same as nationals.

American awareness of this fact has increased in recent years, sharpening our protective animal instincts to do as we have been done to. Our relations with Mexico have been particularly affected, and major controversies continue to surround Mexican-American relations as regards immigration policies, rights to hold jobs and property, and the protection of foreigners accused of crimes. Our long common boundary and economic interdependence guarantee they will continue to be so affected for as long as we both shall live.

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Putting aside the idealistic considerations of how things ought to be, two questions emerge: How does the United States treat the Mexican foreigner; and how does Mexico treat the American foreigner?

This note is a partial answer to the second.

I. Status of Foreigners

A. *Constitutional and International Legal Principles*

The present Mexican Constitution, which dates from 1917, defines foreigners by exclusion as those who do not qualify as Mexican nationals.¹ It goes on, however, to provide that foreigners have a right to the guarantees provided for Mexican nationals under the Constitution. This same principle of equality of treatment is further reenforced by other national laws² and by international agreements to which Mexico is a party.

Among the latter, the Convention on the Rights and Duties of States signed at Montevideo in 1933³ provides that foreigners shall enjoy the same protection of the law as do nationals but may not claim rights more extensive than those of nationals. The Inter-American Convention regarding the status of aliens signed at Havana in 1928⁴ contains a similar provision, but significantly, Mexico has expressed reservations to Articles 5 and 6 which it interprets not to apply to rights of aliens to acquire property and in respect to expulsion. These matters it has declared to be subject to its own constitutional provisions. Finally, at least one writer believes the Mexican adhesion to the United Nations General Assembly Resolution approving the universal declaration of human rights also represents a source of law applicable to foreigners within Mexico.⁵

In spite of all of these declarations, it is clear that the principle of equality of treatment was never intended to produce equality of opportunity for foreigners. Both constitutions and legislation prior to the Mexican revolution accorded foreigners more favorable treatment than do present dispositions. But the spirit of equality of the earlier era yielded to the fear and distrust brought about by events of the twentieth century and now both the

¹CONSTITUCIÓN POLITICA, art. 33 (Mex.) [hereinafter cited as CONSTITUCIÓN]. On the subject of the status of foreigners in Mexico, two general works can be recommended: X. SAN MARTIN Y TORRES, *NACIONALIDAD Y EXTRANJERIA*, and R. DE PIÑA, *ESTATUTO LEGAL DE LOS EXTRANJEROS*, (Ediciones Botas, 1959). For further references, see CLAGETT & VALDERRAMA, *A REVISED GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO* (1973).

²See particularly the section below on personal liberties.

³Convention on the Rights and Duties of States, December 26, 1933, art. 9, 49 Stat. 3097, T.S. No. 881.

⁴Inter-American Convention Regarding the Status of Aliens, February 20, 1928, arts. 2, 5, 46 Stat. 2753, T.S. No. 815.

⁵Siqueiros, *Administrative Aspects of Foreign Investment in Mexico*, 4 CAL. W.L. REV. 269, 270 (1968).

Constitution and an extensive body of laws have qualified and diminished the rights of foreigners in Mexico.⁶

B. Naturalization and Immigration

Disregarding for the moment the provisions affecting business activity by foreigners, two major federal laws and a body of state law address themselves directly to the status of foreigners. The Nationality and Naturalization Law⁷ is based upon Article 73 of the federal constitution granting the federal congress the power to enact laws regarding nationality and the legal status of aliens. It contains a provision that only federal law may modify or restrict the civil rights of aliens.⁸ This latter provision has produced a debate regarding the extent to which federal law preempts state law affecting the rights of foreigners.⁹ One theory is that federal law, in addition to establishing basic guarantees of individual rights, establishes a minimum standard of treatment in private law matters binding upon the states.¹⁰ In all events, the state constitutional provisions in regard to aliens tend to reinforce the federal provisions, either by referring directly thereto¹¹ or incorporating individual guarantees closely related to the federal standard. Some contain the same statements of equality of treatment before the law¹² as were noted in the federal constitution.

The other federal law of overriding importance to the status of foreigners in Mexico is the General Population Law of 1947, as amended and regulated.¹³ This law establishes the classifications of foreigners resident or entering Mexico and their respective rights. Of the three classifications, nonimmigrant (no inmigrante), immigrant (inmigrante), and permanent resident alien (inmigrado), the latter two provide for residency of some duration while the first is intended for temporary visits.¹⁴ The immigrant visa, which can lead to permanent resident alien status, has been increasingly more difficult to obtain in recent years, the government preferring not to add foreigners to the permanent working force.¹⁵ Consequently those foreign visitors not entering as tourists, students, technicians, political ex-

⁶See BAYITCH & J. SIQUEIROS, *CONFLICT OF LAWS: MEXICO AND THE UNITED STATES*, at 39 ff (1968) [hereinafter cited as BAYITCH & SIQUEIROS].

⁷*Diario Oficial* [D.O.], January 20, 1934.

⁸D.O., January 20, 1934, art. 50.

⁹Siqueiros, *Ley Aplicable al Estado Civil de los Extranjeros en Mexico*, 15 BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO DE MÉXICO 345 (1962). See also BAYITCH & SIQUEIROS, *supra* note 6, at 42.

¹⁰BAYITCH AND SIQUEIROS, *supra* note 6, at 43.

¹¹See, e.g., CONSTITUTION OF BAJA CALIFORNIA art. 8, ¶ III.

¹²See, e.g., CONSTITUTION OF DURANGO, arts. 2 to 26.

¹³D.O., December 27, 1947; D.O., December 3, 1960; D.O., January 7, 1974; Regulations at D.O., May 5, 1962.

¹⁴General Population Law, arts. 42, 44, 52.

¹⁵See Tanner, *Immigration, Importation and Labor Law Applicable to Foreign Businessmen in Mexico*, 4 DEN. J. INT'L L. & POL'Y 63 (1974).

iles, or distinguished visitors, but rather for general business activity, are required to obtain a business visa. The most basic visa authorizes the conduct of business conferences and other limited activities on behalf of organizations operating outside of Mexico. A second type of business visa, issued for a six-month period renewable up to twenty four months, permits foreigners to work directly for Mexican business organizations.¹⁶

The status of permanent resident aliens (*inmigrado*) is acquired only through five-years residence after having been legally admitted as an immigrant (*inmigrante*). The rights and activities of permanent resident aliens are significantly greater than those of nonimmigrants or immigrants. Their right to permanent residence is not subject to any permits, nor are their business activities limited. In general, they enjoy all the rights of Mexican citizenship except those of voting, engaging in political activities, and owning land in certain areas of Mexico. The 1973 foreign investment legislation accords them the same status as Mexican nationals if they are not connected with foreign centers of economic decision making.¹⁷

C. Specific Constitutional Guarantees

The individual rights guaranteed to the foreigner by the constitutional principle of equality are enumerated in Articles 1 through 20 of the Constitution. They include among others, personal freedom (Art. 2); free education (Art. 3); freedom of work and profession (Art. 4); prohibition against compulsory services (Art. 5); freedom of expression of ideas (Art. 6); freedom to write and publish (Art. 7); the right of petition (Art. 8) and assembly (Art. 9); the right to possess arms (Art. 10) and to travel (Art. 11); protection against retroactive laws, as well as deprivation of life, liberty, and property without trial by a competent court (Art. 14); freedom from extradition for political offenses (Art. 15), from unauthorized searches and seizures (Art. 16), and from debtors prison (Art. 17); guarantees regarding detention and criminal trial (of which more will be said in a later part of this analysis) (Arts. 19 through 22); freedom of religion (Art. 24); and freedom from quartering soldiers (Art. 26).

The qualifications to these begin with the Constitution itself. The very article enunciating the principle of equality¹⁸ reserves to the federal executive the exclusive faculty to expel immediately and without hearing any foreigner whose presence is judged to be inconvenient. This is over and above the possibility of deportation which would be based upon violation of some immigration law or regulation.¹⁹ The right of petition (Art. 8), and of

¹⁶General Population Law art. 42 § 3; Regulations art. 71 § 1. As a practical matter many businessmen enter on tourist visas because it is simpler.

¹⁷Law to Promote Mexican Investment and Regulate Foreign Investment, D.O., March 9, 1973.

¹⁸CONSTITUCIÓN, *supra* note 1, art. 33.

¹⁹See generally BAYITCH & SIQUEIROS, *supra* note 6, at 48.

political activities, as well as the unlimited right to work (Art. 4), do not apply to foreigners.²⁰ Other constitutional guarantees have been restricted by general legislation as for example the right to free movement in and out of the country, the right to possess arms, and others. Aliens are specifically prohibited by the Constitution from exercising the vocation of priests (Art. 130). Many of the above touch upon what may be thought of as personal liberties. However, by far the most significant limitations upon the activities of foreigners relate to the right to work, hold land, and engage in business or professions. These are considered in the following sections on Property Rights.

II. Protection of Property Rights

A. Restrictions on Ownership and Business Activities

1. PRINCIPLES AND HISTORY

The ownership of property by foreigners in Mexico and the protection of that property has been the subject of a series of constitutional limitations and a body of basic legislation within Mexico. This body of law has produced a number of as yet unresolved questions under international law concerning the alienability of the right to diplomatic protection.

The Constitution of 1917 states the basic principle which continues to guide Mexican law and policy in this area. Article 27 reads in part as follows:

1. Only Mexicans by birth or naturalization and Mexican legal entities have the right to acquire ownership of lands, waters and their appurtenances, or to obtain concessions to develop mines, waters, or mineral fuels. The State may grant that right to foreigners provided that they agree before the Secretariat of Foreign Relations to regard themselves as nationals with respect to said properties and not to invoke for that reason the protection of their governments in reference to them; under the penalty, in the event of noncompliance with the agreement, of forfeiting to the Nation the properties that they may have acquired by virtue of it. Within a strip of one hundred kilometers along the borders and fifty along the coasts, foreigners shall not under any circumstances acquire direct ownership of lands and waters.²¹

Two principles from that Article remain basic to Mexican legislation affecting foreign ownership: namely that there are "prohibited zones" within which no foreign ownership is permitted,²² and that foreign ownership of other property of which only land, waters, and minerals are mentioned in this section of the Constitution, will be subject to the issuance of a permit from the Mexican government, and to the agreement by the for-

²⁰The qualification with respect to the right to work is contained in CONSTITUCIÓN, *supra* note 1, art. 32.

²¹CONSTITUCIÓN, *supra* note 1, art. 27, para. 1.

²²A form of beneficial ownership through regulated trusts is provided for by recent legislation. See *infra* note 37.

eigner not to seek the assistance of his own government to protect that property. The latter of these is a form of the "Calvo Clause" and it is basic to the Mexican scheme of regulation of foreign ownership.

The constitutional provisions have been expanded through a series of organic laws and amendments to the Constitution. Early organic laws required Mexican companies to include either a foreigners' exclusion clause or the constitutionally prescribed Calvo Clause within their certificates of incorporation and on their share certificates if the company was to own property within prohibited zones or property subject to limited foreign ownership.²³ Further restrictions have been placed on the ownership of rural properties by companies having foreign ownership of more than 50 percent.²⁴ In 1944 an emergency presidential decree enacted by reason of the Second World War expanded the requirement for a foreign office permit to the acquisition of shares in any Mexican corporation regardless of the nature of the business to be carried on by it.²⁵ The language of the decree was unclear on whether the permit would be required for any foreign ownership or for only controlling foreign ownership.²⁶ From the enactment of that decree, notwithstanding the cessation of the state of emergency upon which it was based and two Mexican court decisions holding it was no longer in effect, the Mexican foreign office continued up to the present foreign investment law in 1973 to require a permit and the Calvo Agreement for any foreign ownership in Mexican companies.²⁷

The period between 1944 and the enactment of the present foreign investment law was characterized by several phenomena. On the one hand it was a period of intense and expanding interest in Mexican investment on the part of foreigners. On the other, the enforcement of the prohibitions against foreign ownership and the issuance of permits where sought were irregular, and evasion of the regulations by foreigners was widespread. At the same

²³The basic organic law is Organic Law of Section 1 of Constitutional Art. 27 of December 31, 1925, D.O., January 1, 1926. The regulation respecting the foreign exclusion clause is contained in the Regulation of the Organic Law of Section 1 of Constitutional art. 27 *as amended*, D.O., March 29, 1936, art. 8. Regarding the Calvo Clause incorporation, see D.O., March 29, 1936, art. 10.

²⁴CONSTITUCIÓN *supra* note 1, art. 12. For a recent survey of restrictions on real estate holdings, including the most recent foreign investment legislation, see Chayet & Sutton, *Mexican Real Estate Transactions by Foreigners*, 4 DEN. J. INT'L. L.

²⁵D.O., July 7, 1944. For purposes of this discussion we will not distinguish the conduct of business by a foreign legal entity from that by a Mexican legal entity owned by foreigners. The requirement for the foreign office permit, and for registration under the new foreign investment law is the same and where required is a condition to inscription in the commercial registry.

²⁶On the history of this decree and the problem of excessive executive discretion to which it gave rise, see Siqueiros, *Administrative Aspects of Foreign Investment in Mexico*, 4 CAL. W.L. REV. 269, 272-78 (1968).

²⁷Resolution of the Mexican Supreme Court of September 20, 1962, Amparo 507-62, Quimica Industrial de Monterrey, S.A.; Resolution of the Mexican Supreme Court of September 9, 1964, Amparo 1612-64, Playtex de Mexico S.A. See also the opinion of the Mexican Bar Association in *El Foro IV*, January, 1956.

time, legislation limiting foreign ownership by sector or to specific percentages continued to accumulate. That latter accumulation of restrictions was incorporated within the 1973 foreign investment law. It is extensive.

In the petroleum industry the 1939 amendments to the constitution reserve to the state the right to exploit all petroleum and hydrocarbon deposits.²⁸ The related petrochemical industry was made subject to later regulations reserving the basic industry to the nation, and permitting the elaboration of chemical products based upon basic petrochemicals to companies with 60 percent Mexican ownership.²⁹ A number of other activities are reserved to the state, including the electrical industry, the field of communications including telegraph and radio telegraph, public services and public mail, as well as railroad transportation.

The list of activities reserved to Mexicans or to companies with fixed percentages of Mexican participation has expanded to radio and television,³⁰ land transportation and federal routes,³¹ distribution of L.P. gas and exploitation of forests.³² Limited foreign participation is permitted in a series of other activities. The mining of so-called national reserves must be carried out by companies with at least 66 percent Mexican ownership.

Under 1975 legislation "regular" concessions must be held by companies with no more than 40 percent foreign capital with "Special" concessions being limited to 25 percent foreign ownership.³³ Participation by foreigners in local credit, insurance, and financial institutions is virtually precluded, but limited operations by foreign financial institutions are permitted, subject to registration and regulation.³⁴ Fifty-one percent Mexican capital is required in businesses developing steel, cement, glass, fertilizers, cellulose, or aluminum.³⁵ Sixty percent ownership is required in the automobile-parts manufacturing industry.³⁶

2. MEXICAN FOREIGN INVESTMENT LEGISLATION OF 1973

The Foreign Investment Law of 1973 provides a firmer constitutional basis for the regulation of all foreign business activity.³⁷ The law created a

²⁸Art. 27 as amended by Decree of December 27, 1936, D.O., December 9, 1940. See also the amendments of D.O., January 20, 1960 and December 29, 1960.

²⁹Regulation of art. 27 in the Field of Petroleum and Petrochemicals, D.O., February 9, 1971, arts. 4, 15, para. III.

³⁰Federal Radio and Television Law, arts. 2, 14, and 25.

³¹Foreign Investment Law, *infra* note 37, art. 4.

³²Forestry Law, art. 87.

³³The Mining Law; Regulation of Constitutional Art. 27 in the Area of Exploitation and Use of Mineral Resources in force on April 20, 1960, as amended on January 4, 1966; Regulation of the Mining Law, in force since January 1967. The most recent law is the Mining Law of 1975.

³⁴D.O., December 29, 1971. Rules for the operation of representation offices were published on April 11, 1972.

³⁵D.O., July 2, 1970.

³⁶D.O., October 24, 1972, arts. 11, 33.

³⁷Law to Promote Mexican Investment and Regulate Foreign Investment, D.O., March 9, 1973. See I. GOMEZ PALACIO, *ANÁLISIS DE LA LEY DE INVERSIÓN EXTRANJERA EN MÉXICO*

commission to determine and coordinate overall policy in this area and to pass on specific requests for permits, a registry for all foreign ownership, and a new overall limitation on foreign ownership in any business activity of 49 percent. Because the law authorizes the foreign investment commission to grant exceptions to the 49 percent limitation by reference to a broad list of criteria relating generally to economic improvement within the country and balance of payments considerations, the possibilities for foreign investment in Mexico remain subject, today as before, to government permit.³⁸ Now, however, published procedures for obtaining investment permits, and rulings covering areas of general concern or uncertainty, provide greater certainty and a measure of protection. One can often determine the probability that a permit will be issued or that a business operation will be permitted to continue without a deterioration of its position within the Mexican economic community.³⁹ Too, individuals aggrieved by commission decisions would appear to have at least a theoretical right to appeal any procedural irregularities.

The law has also carried forward the provisions of the 1971 Presidential Decree enabling foreigners to become beneficial owners of property within prohibited zones by establishing trusts through Mexican banking and credit institutions.⁴⁰ Finally, it has made clear and more severe the penalties for Mexicans as well as foreigners who attempt to circumvent the legislation.⁴¹

3. INDUSTRIAL PROPERTY RIGHTS

Mexico has recently joined the growing list of countries eschewing the traditional principles governing the protection and transfer of technology and industrial property rights in favor of legislation that has the practical effect of attenuating these largely foreign held rights and property interests. The January 1973 Law on the transfer of technology creates the now familiar Commission to review and approve all contracts for the transfer of technology (including patent and trademark rights).⁴² Its list of prohibited

(1974). For an historical and comparative analysis of that law, see Lacey & Sierra de la Garza, *Mexico—Are the Rules Really Changing?*, 7 INT'L LAW. 560 (1973) [hereinafter cited as, Lacey & Sierra de la Garza].

³⁸Initially there was some question how strictly the 49% limit would be adhered to. Exceptions have been rare — ten during the first three years — and most of these providing for subsequent "Mexicanization." See *Investing, Licensing and Trading Conditions Abroad* (Section on Mexico), BUSINESS INTERNATIONAL, March 1977.

³⁹See Camp & Rojas Magnon, *Recent Developments Under the Mexican Foreign Investment Law and the Law Regulating the Transfer of Technology*, 8 LAW, AM. 1 (1976).

⁴⁰Foreign Investment Law, D.O., March 9, 1973.

⁴¹Penalties include fines for company directors and officers up to 100,000 pesos and prison sentences of up to nine years. Foreign Investment Law, arts. 28, 29, 31, D.O., March 9, 1973.

⁴²Law on the Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks, D.O., December 30, 1972. In the Mexican law, see Lacey & Sierra de la Garza, *supra* note 37. The evolution of Third World thinking on this subject can be traced in the deliberations and resolutions of the United Nations Conference on Trade and Development (UNCTAD). See, Manila Declaration Regarding Commodities, Trade Negotiations, Transfer

practices introduces antitrust principles into this area. The statutory priorities and discretionary approval mechanism are directed towards rejecting unneeded technology and promoting freer internal self-development and export trade.⁴³ It also serves to equalize the bargaining power of the sometimes unsophisticated licensee.

If the heritage of the laws on technology transfer is Japanese (with some Andean and Argentinian influence), the 1976 Law on Inventions and Trade-marks has some distinctly Eastern European antecedents.⁴⁴ The substitution of the certificate of invention for the patent in key sectors where immediate availability of ideas is deemed more important than their protection reflects Soviet thinking in this area.⁴⁵

More directly antiforeign and perhaps more cultural than economic in conception are the provisions requiring the linking of Mexican marks to foreign-owned marks and their display with equal prominence.⁴⁶ The decision to delay the effective date of these, at least in some cases, until February 10, 1979, is a restatement of the difficulty of regulating culture along with commerce in this area, and echoes the confusion surrounding the linguistic squabble in Quebec, Canada.⁴⁷ The future and impact of the trademark linking legislation in Mexico is still unclear; but the sections on patent rights and transfer of technology would now appear to be a permanent part of the Mexican laws limiting foreign property and business rights in Mexico.

of Resources and Technology, and Economic Cooperation, UNCTAD Doc. TD/195, *reprinted in* 15 INT'L LEGAL MATS 414 (1976); Proposals Before the Committee on Transfer of Technology, UNCTAD Doc. TD/B/C. 6/1, *reprinted in* 14 INT'L LEGAL MATS 1329 (1975). See also C. OKOLIE, *LEGAL ASPECTS OF INTERNATIONAL TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES* (1975).

⁴³Prohibited, among other practices, are royalty-free cross licenses, restrictions on exports, and restraints on independent acquisition and development of competing technology. The desire for self-controlled internal development is underlined by the creation of a special National Council on Science and Technology. On the antitrust aspect see Ebbs, *Transfers of Foreign Technology in Latin America: The Birth of Antitrust Law?, Developments in International Antitrust Law*, 43 *FORDHAM L. REV.* 719 (1975).

⁴⁴Ley de Invenciones y Marcas, D.O., February 10, 1976. Among the areas in which certificates of invention (rather than patents) will not issue are pharmaceuticals, beverages and food stuffs, fertilizers, herbicides and pesticides, processes for obtaining chemical mixtures or alloys, antipollution devices and processes, and nuclear energy. A certificate of invention of ten-years duration may be obtained in the last three of these. This permits exploitation by any interested party under supervised private agreements upon payment of controlled royalties or direct government authorization. See Medina, *Significant Innovations of the New Mexican Law on Inventions and Trademarks*, 7 *GA. J. INT'L & COMP. L.* 5 (1977).

⁴⁵An argument that the present International Patent System operates to the disadvantage of less developed countries has been elaborated by a number of writers. U. ANDERFELT, *INTERNATIONAL PATENT LEGISLATION AND DEVELOPING COUNTRIES* (1971); Greer, *The Case Against Patent Systems in Less Developed Countries*, 8 *J. INT'L L. & ECON.* 223 (1973); OKOLIE, *supra* note 42.

⁴⁶Ley de Invenciones y Marcas, tit. III, D.O., February 10, 1976.

⁴⁷The extension in D.O., February 6, 1978 applies automatically only to foreign trademarks on goods made under licenses registered prior to February 10, 1976. Others must apply for extensions.

B. Repatriation

Surprisingly, the question of guaranteeing or restricting repatriation has never come up in any of the many laws affecting foreign ownership in business operations in Mexico. Mexico has a free exchange system; whether it could sustain the type of exchange control to make restrictions on repatriation enforceable with its extensive land boundary with the United States may be doubted. In all events, repatriation is not a question, and although it is not restricted one may express some concern that it is not guaranteed either.⁴⁸

C. Expropriation and the Calvo Clause

The laws governing expropriation do not distinguish the property of foreigners from that of nationals.⁴⁹ They have, however, been invoked as part of a program of nationalization to eliminate foreign ownership.⁵⁰ In all cases of expropriation there must be "compensation" (the 1917 Constitution eliminated the word "prior" that appeared in earlier versions) and a showing of public utility.

The Mexican concept of compensation showed early signs of the "softening" that has since overtaken most Third World thinking about this, in a suggestion that the measurement of compensation should involve some social balancing. Perhaps more critically, the basis for compensation is tied constitutionally to tax valuation.⁵¹ While both phenomena might tend to produce an unsatisfactory return to the property owner, there would be no legal basis for discriminatory treatment of foreign property rights.

Neither is there any basis for discriminatory treatment of foreigners in the administration of laws. Notwithstanding, recent business history contains many examples of the exercise of discretionary regulatory powers (over price increases, import permits, working papers, etc.) to maneuver foreign

⁴⁸Although a failure to register an investment is sanctioned by a prohibition against payment of dividends to the foreign shareholder, this is a sanction rather than a restraint since registration is mandatory and not discretionary for the registry officials. Foreign Investment Law, art. 37, D.O., March 9, 1973. In the light of recent devaluations, it is an interesting question whether it would be a violation of the Mexican Constitution for subsequent legislation to restrict repatriation of foreign capital or earnings in existence prior to the effective date of the law.

⁴⁹The basic reference is Article 27 of the Mexican Constitution. This has been supplemented by the Expropriation Law of 1936. See generally TREVINO, in *EXPROPRIATION IN THE AMERICAS* (A. Lowenfeld ed., 1971).

⁵⁰The Expropriation of the Petroleum Industry in 1938 was the most notable example. No commercial or industrial enterprises have been expropriated in over 30 years, the government preferring to "Mexicanize" through means described elsewhere in this paper.

⁵¹The social balancing argument is contained in remarks of one of the members of the Supreme Court who passed on the claims of the oil companies in 1938. The suggestion is that the measure of compensation be directed not towards 100% reimbursement but rather "a means of regulating the equilibrium of economic forces" and thus fulfill a social function. Quoted by TREVINO, *supra* note 49, at 124. Compensation is tied to tax valuation by Article 27 (VI), Mexican Constitution.

companies into positions where they were forced to sell out. Such practices, often termed "creeping expropriation," are in violation of Mexico's own laws but problems of proof and other shortcomings in the system of review of executive action leave one exposed to them in Mexico.⁵²

A new form of this may be in the making in a Mexican governmental position on public contracts now being challenged in cases pending in the United States. In these, formerly private Mexican power companies, now under the control of the Federal Electricity Commission and subject to laws governing Decentralized Organisms, are asserting a right under Mexican administrative law to terminate contracts with foreign power companies which were entered into while the Mexican companies were still private. If this is permitted, it will impose on the aggrieved foreign companies procedures and remedies that are restitutionary rather than compensatory in character.⁵³

Another phenomenon that makes the possibility of expropriation in Mexico of unique interest to foreigners is the Calvo Clause. It is difficult to assess the significance of the longstanding and omnipresent requirement that those who wish to engage in business activity in Mexico agree, as a condition, to renounce their right to seek the protection of their own governments in respect to property interests within Mexico. Two decisions of international tribunals on the subject have upheld the principle that an individual may undertake as a condition to engaging in business in a foreign country not to seek diplomatic assistance in respect to claims arising out of such business operations. However, the opinions recognize that the individual may not thereby deprive his government of its rights under international law. There is a further suggestion in the opinions, and an express stipulation in the Restatement of the Foreign Relations Law of the United States, that a condition to the validity of the clause will be the existence of a bona fide remedy in the national courts satisfying the requirements of procedural justice. It may be then that the impact of Calvo under public international law is reduced to requiring an exhaustion of remedies meeting minimum international standards of due process.⁵⁴

⁵²See, e.g., Creel, Jr., "Mexicanization": A Case of Creeping Expropriation, 22 Sw. L.J. 281 (1968).

⁵³The federal laws sought to be invoked are the Ley General de Propiedades Nacionales, D.O., January 30, 1969, and the Ley de Organismos Decentralizados y Empresas de Participación Estatal, D.O., December 31, 1970. It has been maintained that under the principles of civil administrative law, public contracts may be terminated by the governmental party at any time in recognition of the superiority of public over private interests. The remedy provided through administration recourse would typically not be equivalent to a suit between private parties for breach of contract. See J. OLIVERA TOROS, MANUAL DE DERECHO ADMINISTRATIVO (1968).

⁵⁴The international law case was The North American Dredging Case (United States v. Mexico) 4 R. Int'l Arb. Awards 26 (1926); this case was decided on the authority of The International Fisheries Case, 4 R. Int'l Arb. Awards 691 (1930-31). Section 202 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES addresses the renunciation of rights by foreign nationals.

III. Protection of Personal Liberties

A. *The Rights of Foreigners Accused of Crime*

However attenuated the constitutional principle of equality of foreigners and nationals may have become through constitutional or legislative reservation in the areas of immigration, ownership of property and the conduct of business, it knows no exception in the area of personal liberties. Thus, the rights of foreigners accused of crime are the rights of Mexicans accused of crime.⁵⁵ Although under Mexico's federal system both the determination of the crime and the criminal procedure may be a matter of either federal or state law, the individual guarantees contained in the federal constitution are applicable to all proceedings.⁵⁶

Recent American interest in Mexican treatment of foreigners accused or convicted of crimes stems from the large numbers of Americans detained and imprisoned there, mostly on drug-related offenses. Congressional hearings on the subject produced testimony of abuses of police power and resulted in the 1976 Treaty under which Mexican and American prisoners have been exchanged to permit each to serve out their sentences in their respective homelands.⁵⁷ In connection with the hearings, the State Department prepared an outline of the process by which an individual might be apprehended and tried for drug offenses in Mexico. The criminal procedures it describes and the references to constitutional rights are applicable to arrest and detention for other matters as well. Some of the constitutional rights were enumerated at the beginning of this article and can be seen to be very like those guaranteed by the United States Constitution, the absence of a right to trial by jury and to confront a witness being the two most notable exceptions.⁵⁸ The State Department outline weaves the constitutional elements into their procedural setting and in so doing illustrates how similarly

⁵⁵CONSTITUCIÓN, *supra* note 1.

⁵⁶For a discussion of the federal versus state law question, see BAYITCH & SIQUEIROS, *supra* note 6, at 199-200.

⁵⁷*U.S. Citizens Imprisoned in Mexico: Hearing on H.R. 313 Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. (Part I) (1975) [hereinafter cited as *Hearings*]. The resulting treaty is the Treaty on Prisoner Transfer, November 25, 1976, United States-Mexico, T.I.A.S. 8718 [hereinafter cited as *Treaty*]. The hearings related to mistreatment of Americans detained or in prisons in Mexico — many of them on drug-abuse charges. For an exposition of the constitutional guarantees see MILLER, *Mexican Jails and American Prisoners*, 51 L.A.B.J. 439 (1976). For a discussion of the Treaty and especially of the U.S. constitutional issues see Kennedy, *Execution of Foreign Sentences in the United States: A Treaty With Mexico*, 9 ST. MARY'S L.J. 118 (1977).

⁵⁸The guarantees are in fact more detailed than those specifically provided for in the United States Constitution but the protection they provide is not comparable. The 72-hour investigatory detention period is another feature that has permitted many of the abuses frequently complained of. It should be pointed out that these procedures are not uniquely Mexican, but characteristic of criminal procedure in most civil-law countries.

worded abstract guarantees of freedoms can produce very different results in different systems of criminal justice.⁹⁹

1. *Arrest*: A complaint is filed with the District Attorney — *Ministerio publico*. If there is clear evidence that a crime has been committed the police are directed by the District Attorney to arrest the suspect. More frequently, in the case of drug offenders, if the suspect is apprehended in the actual commission of a crime, e.g., in the possession of drugs, the suspect may be arrested by any person without the previous filing of a complaint.

2. *Detention*: The suspect may be detained for up to three days by the police while the District Attorney conducts a preliminary investigation of the case. When an arrest takes place in “*flagrante delicto*,” (“caught red-handed”) the preliminary investigation can be extended beyond three days. The authorities have the discretion to allow the suspect’s “defender” (lawyer or trusted relative or friend) to visit him or her during this period. The visit is only to determine the suspect’s state of health and physical condition, and to assure that sanitary regulations and police regulations (against mistreatment, etc.) are not being violated. A defender may not be present during interrogation; cannot give the suspect any legal advice; and the visit may not interfere with the orderly conduct of the preliminary investigation.

The suspect has the right under the Mexican Constitution to remain silent, but any statement made may be used in evidence at the trial. Such a statement may subsequently be retracted or changed by the suspect in a statement during the trial and the court would then decide which of the conflicting statements it chose to believe.

If the suspect’s legal rights are violated, e.g., by mistreatment, he or she has the right to subsequently bring a civil or criminal action against the violator, depending on the severity of the violation, but the case at bar is not voided. If legal rights are violated, the suspect may also petition for an *amparo*, which is tried in a special court. Such special court is constituted on an ad hoc basis by either the full circuit court or by the supreme court. The petition is to initiate a legal action by the special court which could terminate a case or order a government official either to take or to forbid a certain action. Alternatively, the special court could institute some other means for correcting the violation of the suspect’s rights.

3. *Commitment*: When the District Attorney’s preliminary investigation is completed, the suspect is brought before the court. He or she is formally notified of the charges and again informed of the right to retain counsel and to remain silent. The judge examines the evidence, including any statement the suspect may wish to make with respect to the charges.

Following the commitment hearing, the judge must decide within three days whether or not to hold the suspect for trial. If the decision is not made within that period, the suspect must be released, but may be rearrested later if new evidence is uncovered. If the evidence against the suspect is insufficient, the judge must acquit the suspect.

If the evidence is sufficient, the judge issues a decree converting the detention to preventive imprisonment. Within two days after the judge orders preventive imprisonment, the suspect must be formally informed of the charges and at this time, the suspect enters a plea and may file whatever motions are appropriate.

4. *Trial*: The Mexican Constitution provides that, in cases where the maximum sentence exceeds two years—as with most drug-related offenses—the trial must be completed within one year from the date of commitment. Both the prosecution

⁹⁹Hearings, *supra* note 57, at 87 (Part I).

and the defense prepare their cases and the suspect is constitutionally guaranteed sufficient time to prepare his defense.

Under Mexican law, bail is allowed during the trial only in cases where the average possible sentence (the maximum and minimum divided by two) does not exceed five years. The court may refuse to allow bail considering the special nature of the offense. Narcotics cases are usually tried under sections of the criminal code providing for average sentences in excess of five years, with the result that bail is not allowed.

The suspect's plea can be changed at any time during the trial. Evidence is presented to the court by both sides as it is developed, rather than in a single hearing or group of hearings as is done in the common law. The court plays an active role in receiving evidence and directing the investigation. The evidence is in documentary form, and the suspect may, of course, submit any statement. At the final hearing, the significant evidence is read by the clerk of the court and final arguments are made by both sides. The verdict and sentence must be handed down within fifteen days of the final hearing. The decision and sentence are subject to appeal to a higher court by either side.

B. *Access to the Courts and Judicial Review of Executive Action*

In Mexico, foreigners enjoy constitutionally guaranteed free and unrestricted access to the courts.⁶⁰ Furthermore, this access is available to foreign legal entities as well as persons. In the case of the latter, however, such access in respect to business activities carried on in Mexico will be conditioned upon inscription in the commercial registry.⁶¹ Through this access, and through the initiation of judicial review under the Law of Amparo, foreigners may challenge the entire range of executive, legislative, and judicial action through which they may feel aggrieved.

The Law of Amparo regulating this procedure in detail is also based upon the Constitution.⁶² Articles 103 and 107 grant the federal courts jurisdiction to settle controversies arising from laws or acts of authorities that violate individual guarantees. Article 14 guarantees that neither liberty nor property shall be abridged without due process in accordance with the law. From these beginnings, Amparo has evolved into an extraordinary legal remedy subjecting to review by the federal judiciary the following general classifications of governmental action:

⁶⁰CONSTITUCIÓN, *supra* note 1, art. 17.

⁶¹General Law of Commercial Associations, D.O., August 4, 1934, art. 251. The failure to register, however, would not appear to preclude asserting defenses in Mexican legal proceedings, or even initiating an amparo appeal in appropriate circumstances. See BAYITCH & SIQUEIROS, *supra* note 6, at 51, 70.

⁶²The original text of the present law dates from 1936, D.O., January 10, 1936; the most recent amendment occurred in 1968, D.O., April 30, 1968. The literature on Amparo is extensive. Recent and authoritative is I. BURGOA, *EL JUICIO DE AMPARO* (6th ed. 1968). In English, R. BAKER, *JUDICIAL REVIEW IN MEXICO, A STUDY OF THE AMPARO SUIT* (1971). For a discussion in a comparative setting, see H. Fix Zamudio, *Judicial Protection of the Individual Against the Executive in Mexico* in 2 *JUDICIAL PROTECTION AGAINST THE EXECUTIVE* 713 (H. Mosler ed., 1970).

- (1) acts of the executive, whether federal or state, and at whatever level, which violate the individual liberties guaranteed by the Constitution;
- (2) unconstitutional federal or state legislation;
- (3) judicial or quasi-judicial decisions which err in selection, application, or interpretation of secondary (other than constitutional) legislation.⁶³

The writ of amparo is a marvel of jurisprudential elaboration, but there is much evidence that it does not always work out in practice as its architects intended. On the one hand its existence, the methods by which it functions in different settings, the written guarantees of independent action that are supposed to make it effective, all have been the subject of admiration and learned treatises. On the other, there are many who believe that the domination of the judiciary by the executive in the Mexican scheme, and other peculiarities and abuses within the system, have deprived the amparo of so much of its effectiveness that it is questionable whether it does not often serve more to impede and confuse serious efforts to review illegal, unfair, or arbitrary executive action, than to aid them. Representative of what is the prevailing scholarly tone is the assessment of one of Mexico's leading constitutional experts Felipe Tena Ramirez:

Whatever opinion may be held, whatever may be the final destiny of the amparo, the truth is that for us as Mexican jurists it can only inspire admiration to behold the heroic courage with which the writ of amparo steps into every breach, in every place where danger threatens the national judicial structure.⁶⁴

In sharp contrast is the critical assessment of another Mexican writer:

As mentioned, both the writ of amparo against laws, and the writ of amparo against judgments suffer from great defects. The writ of amparo against acts (of the executive) is even more defective.⁶⁵

The author of the above criticism singles out seven specific areas in which "profound reforms would be necessary in the administration of justice in Mexico to really achieve judicial protection of the individual."⁶⁶ They are aimed at producing a truly independent judiciary, clearer definitions of standards for executive action, and an effective system of criminal responsibility for public officials, elements which the author — and others — do not believe exist today in Mexico.

⁶³The third of these is based upon art. 104, which has made the federal supreme court the final court of appeal from all decisions in all Mexican courts.

⁶⁴Quoted with approval and with the addition of the words "and we may add the human person," by H. Fix Zamudio, *supra* note 62, at 767.

⁶⁵N. Alcalá-Zamora y Castillo, *Judicial Protection of the Individual Against the Executive in Mexico*, in 2 JUDICIAL PROTECTION AGAINST THE EXECUTIVE 771, 776 (H. Mosler ed., 1970). The author provides a blueprint for the improvement of the amparo remedy which is in fact a sharp and detailed criticism of its shortcomings in practice. For other criticisms see Baker, *supra* note 62, at 268-73 on the amparo contra leyes.

⁶⁶Alcalá-Zamora y Castillo, *supra* note 65, at 778, 779. The reforms are necessary, according to the author, "to prevent (the amparo) from becoming a dead letter in practice."

C. Diplomatic Assistance

The Consular Convention between the United States and Mexico provides that consular officials may address the respective governmental authorities for the purpose of protecting their nationals.⁶⁷ It provides further that a complaint may be made for violation of individual rights and be prosecuted through diplomatic representation through the Mexican government. Consular officers have the right to receive notice of arrests, to communicate with their respective nationals and to assist in proceedings before Mexican authorities. American legislation bearing upon this process imposes upon the President of the United States a duty to inquire into the situation of U.S. citizens who have been unjustly deprived of liberty by any foreign government.⁶⁸ It is the position of the United States State Department that in so doing the standard to be used in determining unjustness is the minimum international law standard.⁶⁹

If the opportunity for diplomatic intervention on behalf of Americans detained in Mexico has been frequent in recent years, the efficacy of that had been unspectacular until the recent treaty on prisoner exchange.⁷⁰ The congressional hearings that resulted from the charges of irregularities in the drug-related arrests of Americans revealed a consular staff inadequate in numbers to follow up on alleged abuses and Mexican authorities uncooperative and uncommunicative.⁷¹ For its part the federal executive in the United States was at first reticent to resort to strong action over the mistreatment of American violators of drug laws whose enforcement the United States had been insisting upon for its own self-protection. The treaty that was finally worked out permits nationals of both countries imprisoned in the other to serve out their sentences in their respective homelands. Under the treaty the transfers must be initiated at the discretion of the transferring state, agreed to by the prisoner and the receiving state, and is not available to any persons with appeals still pending.

The treaty has resulted in the repatriation of a great many Americans serving sentences in Mexico and it is no criticism of it to point out that it

⁶⁷Convention Respecting Consular Officers, August 12, 1942, Mexico-United States, 57 Stat. 800, T.S. No. 985. The text at note 49 relating to the Calvo Clause is also relevant to the effects of diplomatic intervention.

⁶⁸22 U.S.C. 1732 (1976).

⁶⁹*Hearings, supra* note 57, at 93, 94 (part II) (1975-1976) (Letter of Legislative Attorney David M. Sale). There has never been, to this writer's knowledge, any serious argument that the protections afforded by law to individuals accused of crimes in Mexico fall below that minimum international standard. In the *Chattin Case* (United States v. Mexico), United States and Mexican Claims Commission, 4 R. Int'l Arb. Awards 282 (1927), there is an extensive discussion of the differences between evidentiary and trial procedures under American and Mexican law. But the Commission's determination that court proceedings had been irregular appears to have been based upon a finding that proper procedures had not been followed, not that they were not provided for by Mexican law.

⁷⁰Treaty, *supra* note 57.

⁷¹Reference is to the *Hearings, supra* note 57, (1975-1976) (parts I, II, II) and discussed below in the section on differences between the law as written and as enforced.

does nothing to change the processes by which individuals may be detained and imprisoned in the first instance. That, it would seem, must await reform, or at least proper enforcement of Mexican constitutional and criminal laws.

IV. Differences Between the Law as Written and the Law in Practice

It must be conceded that in the past there have been serious differences between the written laws affecting foreigners in Mexico and their application in practice. The treatment of American citizens accused of crimes in Mexico has just been mentioned. The United States congressional hearings on this subject reveal that of 550 Americans in Mexican prisons, by State Department reckoning at least 233 specific instances of denials of legal rights were substantiated, and many others were put in doubt.⁷² Denials of rights involved torture, extortion, self-incrimination, forced confessions, denial of interpreters, incommunicado detention, and excessive detention, among others.

In an earlier period the notoriously irregular enforcement of foreign investment laws led to a condition of illegal foreign ownership of lands and businesses, involving bribery beforehand and extortion after, that is to no one's credit. Those abuses received some attention in the laws of the early 1970s that have legitimized forms of controlled foreign ownership formerly carried out clandestinely and have increased the penalties for Mexicans who collaborate in such schemes.⁷³ Many foreigners profited from this uneven application of the law, but many others lost. The "creeping expropriation" described earlier is one example of the latter.⁷⁴ The new laws do little to lessen the possibility of this practice since a whole range of critical business functions remain subject to discretionary governmental control.⁷⁵ And over all, the uncertainty surrounding the effectiveness of the amparo, the mechanism designed to correct other abuses, makes the protection of foreigners' rights in Mexico through legal means a precarious process at best.

In attempting to evaluate all of this, one may begin by observing that there is no reason to think that where irregularities exist in the application of the law they affect foreigners any more than nationals. It is also fair to say that in many instances the legislative framework has invited abuses through the delegation of unreviewed discretionary power. The use of *prestanombres*⁷⁶ and other abuses by foreign investors prior to the 1973 foreign

⁷²Hearings, *supra* note 57, at 90 (1975-76) (part II). (Statement of Congressman Fortney H. Stark). See text and notes on the effectiveness of the amparo remedy, BURGOA, BAKER and FIX ZAMUDIO, *supra* note 62.

⁷³D.O., March 9, 1973, GOMEZ PALACIO, and LACEY & SIERRA DE LA GARZA, *supra* note 37.

⁷⁴Creel, Jr., *supra* note 52.

⁷⁵Pricing, opening new establishments, importing, and exporting, to mention but a few.

⁷⁶*Prestanombres* is a Spanish word meaning to lend one's name. In Mexico it refers to a practice whereby Mexican citizens allow their names to be used on behalf of foreigners in order to establish a false Mexican national character for an investment.

investment legislation is certainly not unrelated to the fact that executive control of foreign investment during that period exceeded declared constitutional bounds and often responded to individual policy, interest, or disinterest, rather than to any legislative prescription.⁷⁷ Beyond that, there is little question but that culturally Mexicans are less convinced than Americans that justice is always to be found through strict administration of laws. They have been brought up to believe that disregard of a written law to achieve some supposed higher goal is no great tragedy. Their belief in this regard, the seemingly ineradicable institution of "mordida" paid to public officials at every level to obtain favors small and great, and the generalized affluence of the foreigner, all these help to explain the more than occasional inability — one must confess sometimes the unwillingness — of foreigners to obtain the protection of the laws provided for in Mexico.⁷⁸

⁷⁷See Siqueiros, *supra* note 26.

⁷⁸Another approach in individual cases might be a complaint to the Inter-American Commission on Human Rights. One such complaint has been filed, but not disposed of.